

2710

No. 13091

United States
Court of Appeals
for the Ninth Circuit.

WESTERN BOAT BUILDING COMPANY, a
Partnership, and UNITED PACIFIC INSUR-
ANCE COMPANY, a Corporation,

Appellants,

vs.

J. J. O'LEARY, Deputy Commissioner, 14th Com-
pensation District, Under the Longshoremen's
& Harbor Workers' Compensation Act and
ROBERT MARKOVICH,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington
Southern Division

FILED

NOV 14 1951

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Seattle, Washington,
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United States Attorney;

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Assistant United States Attorney,
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Tacoma, Washington,
Attorneys for J. J. O'Leary, Deputy
Commissioner, 14th Compensation
District, etc.

BURTON W. LYON, JR.,
Puget Sound Bank Building,
Tacoma, Washington,
Attorney for Defendant Robert Markovich.

In the District Court of the United States for the
Western District of Washington, Southern
Division

No. 1449

WESTERN BOAT BUILDING COMPANY, a
Partnership, and UNITED PACIFIC IN-
SURANCE COMPANY, a Corporation,

Plaintiffs,

vs.

J. J. O'LEARY, Deputy Commissioner, 14th Com-
pensation District, Under the Longshoremen &
Harbor Workers' Compensation Act.

Defendant.

PETITION FOR INJUNCTION

Come Now Western Boat Building Company, a
co-partnership, and United Pacific Insurance Com-
pany, a corporation, plaintiffs herein, and for
cause of action against the defendant, plaintiff's
allege:

I.

That plaintiff Western Boat Building Company
is and during all times material to this petition was
a copartnership existing under the laws of the state
of Washington, engaged in the business of boat
building and repair at Tacoma, Washington, and
is an employer within the provisions of the Long-
shoremen & Harbor Workers' Act (hereinafter re-
ferred to as the "Act"), U.S.C. Title 33, Sections
901 to 951 inclusive.

II.

That plaintiff, United Pacific Insurance Company, is now and at all times mentioned herein was an insurance company organized as a corporation under and by virtue of the laws of the state of Washington, with its principal place of business at Tacoma, Washington, and was an insurance carrier securing the insurance of the plaintiff Western Boat Building Company, in accordance with the terms and provisions of said Act.

III.

That the defendant, J. J. O'Leary, is now and at all times mentioned, was the Deputy Commissioner of the Fourteenth Compensation District, administering the provisions of said Act.

IV.

That on October 18, 1950, one Robert Markovich was employed by plaintiff Western Boat Building Company as a shoreside fastener. That while working aboard the tug El Sol which had been pulled out of the navigable waters of Tacoma Harbor onto the shore by plaintiff's marine railway, the said Markovich fell from said tug to the shore below, striking on some rocks and timbers on the beach upon which he fell, sustaining disabling injuries to his back.

V.

That the marine railway upon which the tug El Sol was cradled at the time of Markovich's accident is an instrumentality whereby the cradle thereof is floated in and upon navigable waters and

inserted under the bottom of the vessel to be repaired; that said cradle rests upon and runs upon two steel rails from the water onto the shore; that after being cradled as aforesaid the vessel is pulled out of the navigable waters on said cradle to the shore where the vessel rests and work is thereupon performed while the vessel is so resting on the shore.

VI.

That the injury to Markovich did not occur upon the navigable waters of the United States of America, but upon the shorelands of the State of Washington, and the jurisdiction of injuries occurring to the plaintiff's employees is exclusively vested in the Workmen's Compensation Act of the State of Washington.

VII.

That following his aforesaid injury the said Marvovich duly and regularly filed his claim for compensation with the Washington State Department of Labor and Industries under the Washington Workmen's Compensation Act, and said claim was allowed on December 14, 1950, by said Department, being Claim No. B-811942; that the said Markovich has to date received three payments of monthly compensation under the terms and provisions of the Workmen's Compensation Act from the Department of Labor and Industries, on December 14, 1950; December 20, 1950, and January 22, 1951.

That thereafter, on January 10, 1951, the said Markovich also filed a claim with defendant J. J.

O'Leary under the Longshoremen & Harbor Workers' Compensation Act; that the plaintiffs controverted said claim upon the ground that the plaintiff's injury did not occur on navigable waters of the United States and was not within the jurisdiction of the Longshoremen & Harbor Workers' Act.

VIII.

That on February 26, 1951, a hearing was held before defendant J. J. O'Leary, Deputy Commissioner, which resulted in a compensation order and award of compensation being filed by the said J. J. O'Leary on March 20, 1951, wherein the said J. J. O'Leary unlawfully and illegally attempted to assume jurisdiction of Markovich's injury; that a copy of said compensation order and award of compensation is attached hereto, marked Exhibit "A" and by reference made a part hereof as though fully set forth herein.

IX.

That a certified copy of the transcript of testimony taken at said hearing, together with all exhibits received in evidence in connection therewith, will be filed in this cause under the certificate of the Deputy Commissioner, which said testimony and exhibits are by this reference made a part hereof and incorporated herein as though fully set forth.

X.

That the sole question adjudicated by the Deputy Commissioner was whether the injury to the said

Markovich was within the jurisdiction of the Longshoremen & Harbor Workers' Act.

XI.

That Section 3(a) of the Longshoremen & Harbor Workers' Act provides as follows:

"Compensation shall be payable under this Act in respect to disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for disability or death through workmen's compensation proceedings may not validly be provided by state law."

XII.

That in the case of *Norton vs. Vesta Coal Co.*, 63 F. (2d) 165, it was adjudicated by the Third Circuit Court of Appeals that a marine railway located on land and similar to the marine railway of plaintiff Western Boat Building Company was not within the jurisdiction of the Act. That an appeal from said decision was thereupon taken to the Supreme Court of the United States by the Deputy Commissioner by writ of certiorari. That on January 15, 1934, in the appeal of said cause, reported in 78 L. Ed. 536, 290 U. S. 613, appears the following order of the Supreme Court:

"Per curiam as it appears that the government has now adopted the conclusion that the decision below is correct and no substantial controversy is presented at the bar of this Court, the writ of certiorari herein is dismissed."

XIII.

That on July 1, 1937, the Supreme Court of the State of Washington in the case of Rholfs vs. Department of Labor & Industries, Wash. 190 Wp. 566, held that marine railways were subject to the exclusive jurisdiction of the Workmen's Compensation Act of the State of Washington.

XIV.

That the Supreme Court of the United States has held in the case of Davis vs. Dept. of Labor & Industries, 317 U. S. 249, 87 L. Ed. 246, that in questions of apparent conflicts of jurisdiction between the Washington Workmen's Compensation Act and the Longshoremen & Harbor Workers' Act, a workman by filing a claim under the said Workmen's Compensation Act makes a valid election for compensation purposes and it is legal and lawful for the Washington Workmen's Compensation Act to assume exclusive jurisdiction of such a claim.

XV.

That even if defendant J. J. O'Leary had jurisdiction to enter said order, said order is not in accordance with law, since it fails to provide credit in said order to the plaintiff for the payments previously received by the said Markovich under the terms and provisions of the Workmen's Compensation Act of the State of Washington.

XVI.

That the said compensation order and award of defendant J. J. O'Leary, dated March 20, 1951, is

not in accordance with law, is arbitrary, capricious, and should be suspended permanently, set aside, and held for naught.

XVII.

That less than thirty days have elapsed since the entry and filing of said compensation order and award of compensation and the plaintiffs have no relief or adequate remedy at law.

Wherefore, plaintiffs pray for judgment as follows:

1. That a decree be entered herein, adjudging said compensation order and award of defendant J. J. O'Leary dated March 20, 1951, and attached hereto and made a part hereof as Exhibit "A" to be unlawful and contrary to the provisions of said Act, and directing and ordering that said award be suspended, vacated and set aside, and that the defendant J. J. O'Leary be permanently enjoined from enforcing the same.

2. For such other further or different relief as to the court may seem equitable and just.

BOGLE, BOGLE & GATES,

/s/ EDW. S. FRANKLIN,

Attorneys for Plaintiffs.

State of Washington,
County of King—ss.

Edw. S. Franklin, being first duly sworn, on oath deposes and says: That he is one of the attorneys

for the plaintiffs in the above-entitled action; that he makes this verification on behalf of said plaintiffs as he is so entitled to do; that he has read the foregoing Petition, knows the contents thereof, and believes the same to be true.

/s/ EDW. S. FRANKLIN.

Subscribed and Sworn to before me this 23rd day of March, 1951.

[Seal] /s/ ROBERT V. HOLLAND,
Notary Public in and for the State of Washington,
Residing at Seattle.

EXHIBIT A

U. S. Department of Labor
Bureau of Employees' Compensation
Case No. 217-21

In the Matter of the Claim for Compensation Under the Longshoremen's and Harbor Workers' Compensation Act

ROBERT MARKOVICH,

Claimant,

vs.

WESTERN BOAT BUILDING COMPANY,
Employer,

UNITED PACIFIC INSURANCE COMPANY,
Insurance Carrier.

COMPENSATION ORDER AWARD OF COMPENSATION

Such investigation in respect to the above-entitled claim having been made as is considered necessary,

and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

Findings of Fact

That on the 18th day of October, 1950, the claimant above named was in the employ of the employer above named at Tacoma, State of Washington, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under the said Act was insured by the United Pacific Insurance Company; that on said date the claimant herein, while performing service as a Fastener for the employer and engaged in work incidental to the repair of the tugboat *El Sol* which was then located on a marine railway at the yard of the employer, sustained personal injury resulting in his disability, when, while walking alongside a lifeboat on the upper deck of said vessel, he lost his balance and fell over the side of the vessel, a distance of approximately 40 feet, in consequence of which he suffered a compression fracture of the first lumbar vertebra, multiple abrasions and contusions of shoulders and left ribs; that the marine railway on which the vessel was located is approximately 150 feet long and the lower portion of same extends into the water; that during the time the vessel was undergoing repairs on said marine railway, the stern of the vessel was partially submerged in the navigable waters of Puget Sound at high tide; that the employment in which the claimant

was engaged at the time of his injury was maritime in nature and that said injury occurred upon navigable waters of the United States and comes within the purview of the Longshoremen's and Harbor Workers' Compensation Act; that written notice of injury was not given within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with the provisions of Section 7(a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to \$2,936.75; that as a result of the injury sustained the claimant was wholly disabled from October 19, 1950, to March 14, 1951, on which date he was still so disabled, and he is entitled to 21 weeks compensation at \$35.00 per week for such temporary total disability; that the accrued compensation for temporary total disability to March 14, 1951, inclusive, amounts to \$735.00; that the employer and insurance carrier have paid nothing to the claimant as compensation.

Upon the foregoing facts, the Deputy Commissioner makes the following

Award

That the employer, Western Boat Building Company, and the insurance carrier United Pacific Insurance Company, shall pay to the claimant compensation as follows: 21 weeks at \$35.00 per week for temporary total disability from October 19,

1950, to March 14, 1951, inclusive, in the amount of \$735.00, which amount the employer and carrier are directed to pay forthwith in one sum (less attorney's fee hereinafter provided for) and shall thereafter Continue payments of compensation at the rate of \$35.00 per week until disability shall have ceased or until further order of the Deputy Commissioner.

A fee in the amount of \$75.00 is hereby approved in favor of Attorney Burton W. Lyon, Jr., for services rendered the claimant in connection with the presentation of his claim for compensation, same to be a lien upon and deducted from the payment of this award.

Given under my hand at Seattle, Washington, this 20th day of March, 1951.

/s/ J. J. O'LEARY,
Deputy Commissioner, 14th
Compensation District.

Proof of Service

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer, and the insurance carrier, at the last known address of each as follows:

Mr. Robert Markovich, 3822 So. Asotin, Tacoma 8, Wash.

Western Boat Building Company, 2505 E. 11th Street, Tacoma, Wash.

United Pacific Insurance Company, P. O. Box 1216, Tacoma, Wash.

Regular Mail

Atty. Burton W. Lyon, Jr., 507 Puget Sound Bank Bldg., Tacoma, Wash.

Bogle, Bogle & Gates, Attys., Central Bldg., Seattle 4, Wash.

Mailed March 20, 1951.

/s/ J. J. O'LEARY,

J. J. O'LEARY,

Deputy Commissioner.

JJO:mlc

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

MOTION FOR INTERLOCUTORY INJUNCTION TO STAY PAYMENT OF COMPENSATION

Comes Now plaintiff, Western Boat Building Company, and moves the Court for an order staying any payments of amounts required by the compensation order filed by defendant J. J. O'Leary as Deputy Commissioner on March 20, 1951, until final decision in this proceeding for the reason that irreparable damage will otherwise ensue to the employer herein if said award is not stayed.

This motion is based upon the petition for injunction filed herein, and upon the supplemental affidavit of Edw. S. Franklin, one of the attorneys

for plaintiffs, attached hereto and made a part hereof.

BOGLE, BOGLE & GATES,

/s/ EDW. S. FRANKLIN,

Attorneys for Plaintiffs.

State of Washington,
County of King—ss.

Edw. S. Franklin, being first duly sworn upon oath, deposes and says:

That he is one of the attorneys for the plaintiffs herein and makes the within affidavit in support of plaintiff's motion to stay the payments of compensation required by the order and award of defendant J. J. O'Leary, dated March 20, 1951, until final decision of this proceeding.

That under the terms of said order, the plaintiff Western Boat Building Company is required to pay to the claimant Markovich within ten days from October 20, 1950, the sum of \$735.00 as well as to make continuing compensation payments thereafter.

That if said payment of \$735.00 is not made within said time, said award will carry an additional penalty of 20 per cent of the amount of said compensation payments found due by said order, to be assessed against said employer.

That the injured workman, Robert Markovich, is propertyless and insolvent, and it would be financially impossible to recover any payments of compensation paid said claimant if said order of the Deputy Commissioner is subsequently reversed.

That the order of the Deputy Commissioner under date of March 20, 1951, is arbitrary, capricious, and not in accordance with law, and takes the plaintiff's property without due process of law.

/s/ EDW. S. FRANKLIN.

Subscribed and Sworn to before me this 23rd day of March, 1951.

[Seal] /s/ ROBERT V. HOLLAND,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

MOTION TO INTERVENE
AS DEFENDANT

Comes now Robert Markovich and moves for leave to intervene as defendant in the above-entitled action in order to assert defenses which the applicant has to the matters referred to in the motion and petition of the plaintiffs for an interlocutory injunction to stay the payment of compensation award by the defendant to the applicant for intervention in that certain proceedings before the defendant entitled "In the matter of the claim for compensation under the Longshoremen & Harbor Workers' Compensation Act, Robert Markovich, Claimant, vs. Western Boat Building Company, employer; United Pacific Insurance Company, in-

surance carrier, Case No. 217-21'' upon which the above-entitled proceeding is based, and from which proceedings the plaintiff is making appeal to all of which matters the applicant for intervention has defenses to plaintiff's said petition and motion for an interlocutory injunction and appeal in the above-entitled proceedings.

Dated this 28th day of March, 1951.

/s/ BURTON W. LYON, JR.,
Attorney for Applicant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 29, 1951.

[Title of District Court and Cause.]

ORDER ALLOWING ROBERT MARKOVICH
TO INTERVENE

The matter of the motion of Robert Markovich for leave to intervene in the above proceedings having come on regularly before the court for hearing on Thursday, the 29th day of March, 1951, and the applicant for intervention being represented by his attorney, Burton W. Lyon, Jr., and the plaintiffs being represented by their attorney, Edward S. Franklin, and the defendant J. J. O'Leary being represented by the Honorable J. Charles Dennis, the United States District Attorney, and Guy A. B. Dovell, Assistant United States Attorney, and the said attorneys for the plaintiffs and the defendant

having stipulated in open court that there was no objection to the application of Robert Markovich for leave to intervene in the above-entitled proceedings.

It Is Hereby Ordered, Adjudged and Decreed, That Robert Markovich be and he is hereby authorized and allowed to intervene in the above-entitled proceedings.

Done in Open Court this 2nd day of April, 1951.

/s/ CHARLES H. LEAVY,
United States District Judge.

Presented by:

/s/ BURTON W. LYON, JR.,
Attorney for Intervener.

[Endorsed]: Filed April 2, 1951.

[Title of District Court and Cause.]

DEFENDANT O'LEARY'S ANSWER
TO PETITION

Defendant J. J. O'Leary, by his attorneys, for his answer to the petition:

1. Admits the allegations in the petition contained in paragraphs numbered 1, 2, 3, 7, 11, 17.

2. Admits that on October 18, 1950, one Robert Markovich was injured while employed as a "fastener" aboard the tug El Sol, which was on a marine railway, when he fell from said vessel. Denies each

and every other allegation in said complaint, particularly that the injured employee fell on dry land.

3. Admits that the vessel upon which Markovich was working was pulled up part way out of the water on a marine railway but denies that the vessel was completely out of the water.

4. Denies the allegations in paragraphs in the petition numbered 6, 16.

5. Admits that the deputy commissioner on March 20, 1951, filed a compensation award in favor of the injured employee but denies that said action was unlawful as alleged in paragraph 8.

6. That insofar as plaintiff's attempt to interpret certain court decisions in paragraphs numbered 12, 13 and 14 of the petition, defendant neither admits nor denies the correctness of said interpretations but begs leave to refer to said decisions in his brief.

7. Defendant admits that any sums shown to have been paid to the injured employee as compensation by plaintiffs pursuant to the Workmen's Compensation Law of the State of Washington are the proper subject of credit against the payments due under an award made pursuant to the provisions of the Longshoremen's Act.

Wherefore Defendant O'Leary prays that the petition be dismissed.

/s/ J. CHARLES DENNIS,

United States Attorney;

/s/ GUY A. B. DOVELL,

Assistant United States Attorney, Attorneys for
Defendant O'Leary.

Receipt of copy acknowledged.

[Endorsed]: Filed June 4, 1951.

[Title of District Court and Cause.]

INTERVENOR MARKOVICH'S ANSWER
TO PETITION

Intervenor Robert Markovich, by his attorney, for his answer to the petition:

1. Admits that allegations in the petition contained in paragraphs numbered 1, 2, 3, 11, 17.

2. Admits that on October 18, 1950, one Robert Markovich was injured while employed as a "fastener" aboard the tug El Sol, which was on a marine railway, when he fell from said vessel. Denies each and every other allegation in said complaint, particularly that the injured employee fell on dry land.

3. Admits that the vessel upon which Markovich was working was pulled up part way out of the water on a marine railway but denies that the vessel was completely out of the water.

4. Denies the allegations in paragraph 6 of the petition.

5. Admits that on January 10, 1951, Markovich filed a claim with the defendants J. J. O'Leary under the Longshoremen and Harbor Workers' Compensation Act, and that the plaintiffs controverted said claim and further admits that the intervenor, Markovich has to date received three payments of monthly compensation under the terms and provisions of the Workmen's Compensation Act from the Department of Labor and Industries; the intervenor denies each and every other allegation in paragraph 7.

6. Admits that on February 26, 1951, a hearing was held before the defendants, O'Leary, and that on March 20, 1951, the defendant, O'Leary, filed a compensation award in favor of the intervenor, Markovich, but denies that said action was unlawful as alleged in paragraph 8 of the petition.

7. Denies the allegations contained in paragraph 10 of the petition.

8. Denies that the conclusions stated and inferences drawn from the quotations stated in paragraphs 12, 13 and 14 of the petition correctly state the law applicable to the facts of the above-entitled proceedings.

9. Denies the allegations contained in paragraphs 15 and 16 of the petition.

Wherefore Intervenor Robert Markovich prays

that the petition be dismissed and the intervenor recover cost and attorney's fees.

/s/ BURTON W. LYON, JR.,
Attorney for Intervenor.

[Endorsed]: Filed June 5, 1951.

United States District Court, Western District of
Washington, Southern Division

No. 1449

WESTERN BOAT BUILDING COMPANY, a
Partnership, and UNITED PACIFIC IN-
SURANCE COMPANY, a Corporation,

Plaintiffs,

vs.

J. J. O'LEARY, Deputy Commissioner, 14th Com-
pensation District, Under the Longshoremen's
& Harbor Workers' Compensation Act,

Defendant,

ROBERT MARKOVICH,

Intervenor.

ORDER OF DISMISSAL

The above-entitled cause coming on regularly to be heard before the court on July 5, 1951, upon plaintiffs' petition for injunction and upon the separate answers thereto of the above-named deputy commissioner, and the intervening claimant, and the plaintiffs thereupon having interposed their

motion for trial de novo upon the question of difference between a marine railway and the term "any dry dock" and if intervenor was injured on navigable waters of the United States, within the meaning of the Longshoremen's and Harbor Workers' Act, with the offer of expert testimony thereon, on the ground that the same involved a jurisdictional fact and was open to review, and the court having received the memorandum of the deputy commissioner thereon and heard and considered the arguments of counsel, and it appearing to the court that evidence upon the alleged question of jurisdictional fact has been fully and completely presented before the deputy commissioner and that the plaintiffs do not allege that they have newly discovered evidence or different evidence to present to the court, nor do plaintiffs advance any other valid reason why there should be a new record, and it also appearing that such matter of trial de novo is within the discretion of the court, and the court having for such reasons denied the motion therefor, and the court having thereupon proceeded to hear and determine this matter upon the transcript of the record of hearing before the deputy commissioner herein filed and upon the respective briefs of counsel herein directed to be filed, and the plaintiffs having conceded that there was substantial evidence to support the deputy commissioner's findings on factual issues and confined the issues herein to the legal correctness of the deputy commissioner's conclusion that such accident occurred upon the navigable waters of the United States and came

within the purview of the said Act, and to the further question of the legal effect of acceptance of payments allowed claimant under the Washington Workmen's Compensation Act, as appears from the record; and the court having heard the oral arguments of counsel, and it appearing to the court that an examination of the record discloses that there is adequate support for all of the deputy commissioner's findings, and that his order is in accordance with law and comes within the scope of the Act as applied, and it further appearing to the court that the payments from the state were voluntary and without an award of compensation under the Workmen's Compensation Act of said state, and were not prejudicial to the rights of the claimant thereafter to claim compensation under the Longshoremen's and Harbor Workers' Compensation Act, and that the principle of "first come, first serve," as enunciated by the Supreme Court in *Davis vs. Department of Labor and Industries*, 317 U. S. 249, is not, upon the record, applicable in this case, and it, therefore, appearing to the court that the compensation order should be affirmed and the petition for injunctive and other relief should be denied, and dismissed, it is now, therefore,

Ordered, Adjudged and Decreed that the Compensation Order and award of Compensation of the Deputy Commissioner, filed in this court and cause, be and the same is in all respects hereby affirmed and determined in accordance with law; and it is further

Ordered, Adjudged and Decreed that any sums shown to have been paid to the claimant as compensation pursuant to the Workmen's Compensation Act of the State of Washington shall be credited against the payments due claimant under award made pursuant to the provisions of the Longshoremen's Act; and it is further

Ordered, Adjudged and Decreed that Burton W. Lyon, Jr., Counsel for intervenor, be and he is hereby allowed \$250.00 as attorney's fee to be paid from intervenor's compensation award herein and it is lastly

Ordered, Adjudged and Decreed that plaintiff's motion for preliminary injunctive relief from payments pending further proceedings, admittedly made in behalf of the insurance carrier, and not the employer, has no basis in law, and the same and plaintiffs' petition herein filed is denied, except as otherwise provided by the stipulation of the parties filed herein, and that the above-entitled action be and the same is hereby dismissed with costs to defendants.

The plaintiffs, by counsel, except to the foregoing rulings of the court and such exceptions are hereby allowed.

Done in Open Court this 17th day of July, 1951.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.
Sitting by Assignment.

Approved and Presented by:

GUY A. B. DOVELL,
Of Counsel for Deputy Commissioner J. J. O'Leary,
Respondent Above Named.

/s/ BURTON W. LYON, JR.,
Attorney for Intervening Claimant, Robert Marko-
vich, Intervenor Above Named.

Approved as to Form Only:

BOGLE, BOGLE & GATES,
/s/ EDW. S. FRANKLIN,
Of Counsel for Plaintiffs.

Entered July 17, 1951.

[Endorsed]: Filed July 17, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To J. J. O'Leary, Deputy Commissioner, 14th Compensation District, under the Longshoremen's & Harbor Workers' Compensation Act, Plaintiff herein; and to the Honorable J. Charles Dennis, United States District Attorney, and Guy A. B. Dovell, Assistant United States District Attorney, his attorneys; and to Robert Markovich, Intervenor, and to Burton W. Lyon, Jr., his attorney:

Notice Is Hereby Given that the plaintiffs above named, Western Boat Building Company, a part-

nership, and United Pacific Insurance Company, a corporation, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order entered in the above court on the 17th of July, 1951, dismissing plaintiffs' petition for an injunction, and from each and every part of said Order.

Dated this 7th day of August, 1951.

BOGLE, BOGLE & GATES,

/s/ EDW. S. FRANKLIN,

Attorneys for Plaintiffs, Western Boat Building Company, a Partnership, and United Pacific Insurance Company, a Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed August 7, 1951.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, Western Boat Building Company, a partnership, and United Pacific Insurance Company, a corporation, as principals, and Fireman's Fund Indemnity Company, as surety, are held and firmly bound unto the above-named J. J. O'Leary, Deputy Commissioner, 14th Compensation District, under the Longshoremen's & Harbor Workers' Compensation Act, Defendant, in the sum of

\$250.00; to which payment well and truly to be made, we bind ourselves jointly and severally, our heirs, executors, successors, and assigns, respectively, firmly by these presents.

Sealed with our seals and dated this 31st day of July, 1951.

Whereas, the plaintiff, Western Boat Building Company, a partnership, and United Pacific Insurance Company, a corporation, have prosecuted their appeal to the United States Court of Appeals for the Ninth Circuit to reverse the order entered in said cause, by the United States District Court for the District of Washington, Southern Division, on the 18th of July, 1951, dismissing the plaintiffs' petition for injunction in the above matter.

Now, therefore, the condition of this obligation is such, that if the above-named plaintiffs shall prosecute their appeal to effect and answer all costs if the said plaintiffs fail to make good their plea, then this obligation to be void, otherwise in full force and virtue.

WESTERN BOAT BUILDING COMPANY, a
Partnership, and UNITED PACIFIC IN-
SURANCE COMPANY, a Corporation,

By BOGLE, BOGLE & GATES,
Their Attorneys, Principals.

[Seal]

FIREMAN'S FUND
INDEMNITY COMPANY,

By /s/ CASSIUS E. GATES,
Its Attorney in Fact,
Surety.

Receipt of copy acknowledged.

[Endorsed]: Filed August 7, 1951.

U. S. Department of Labor
Bureau of Employees' Compensation

Before: J. J. O'Leary, Deputy Commissioner,
Fourteenth Compensation District.

Case No. 217-21

ROBERT MARKOVICH,

Claimant,

against

WESTERN BOAT BUILDING CO.,

Employer,

UNITED PACIFIC INSURANCE CO.,

Carrier.

TRANSCRIPT OF TESTIMONY
AT HEARING

Pursuant to notice, this matter was heard before
J. J. O'Leary, Deputy Commissioner, U. S. Dept.
of Labor, Bureau of Employees' Compensation, at
Tacoma, Washington, on February 26, 1951, at
11:00 o'clock a.m.

Appearances:

BURTON W. LYON, ESQ.,

Appearing for the Claimant.

EDW. S. FRANKLIN, ESQ.,

Of Bogle, Bogle & Gates,

Appearing for the Employer and Carrier.

PROCEEDINGS

The Commissioner: If you are ready, we will start at this time.

This hearing is upon my own initiative, under authority of Subdivision H of Section 14 of the Longshore & Harbor Workers' Compensation Act, it following the filing of a claim for compensation by Robert Markovich for disability and loss of time from work, in consequence of injury sustained by him on October 18, 1950, while employed as a fastener by the Western Boat Building Company at Tacoma.

It appears from the papers already on file, that on said date claimant was engaged in work incidental to the repair of the tug El Sol which was, at the time, on a marine railway in the yard of the employer.

In his claim for compensation, Mr. Markovich alleges that while he was engaged in removing ration tanks from a lifeboat aboard the tug El Sol, while walking around the outer side of the lifeboat, he lost his balance and fell a distance of forty feet; in consequence of which he suffered fracture of three vertebrae in his spine, and the fracture of two ribs.

He apparently has been disabled from the time of the injury up to the present time, and no compensation has been paid by the United Pacific Insurance Company, the carrier insuring the liability of the employer, for compensation under the Longshoremen's and Harbor Workers' Compensation Act, but it appears from [2*] information furnished by the insuring carrier, United Pacific Insurance Company, that the Department of Labor & Industries of the State of Washington has been making payment of compensation to the claimant, and has assumed responsibility for his medical treatment.

Now, Mr. Franklin, on what grounds is this claim resisted?

Mr. Franklin: Upon the ground, Mr. O'Leary, that the injuries to Mr. Markovich are not subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, but are subject to the provisions of the Workmen's Compensation Act of the State of Washington.

The Commissioner: Mr. Lyon, will you state your position in respect to this matter?

Mr. Lyon: Our position is that the injuries occurred at a time when Mr. Markovich was employed in performing work within the scope of the Longshoremen's and Harbor Workers' Compensation Act; that the payments which have been made were voluntary payments made by the State of Washington; and that Mr. Markovich had made no election to receive compensation thereto; that the employer carries liability insurance to protect

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

the employees engaged in their sort of work, and which the employee was performing at the time the injury occurred.

That the ship upon which the employee was performing repairs, at the time of the injuries was still in commission; that it was situated on a marine railway, which was partially [3] submerged in the water at times of high tide; that the crew—some of the crew—was present and on board the boat at the time the injuries occurred.

I think that, in substance, is our position.

The Commissioner: Well, I think we will have Mr. Markovich come up here.

ROBERT MARKOVICH

was called as a witness on behalf of the Claimant, and having been first duly sworn, was examined and testified as follows:

The Commissioner: Will you state your full name and home address, please?

The Witness: My present home?

The Commissioner: Yes.

The Witness: Or at the time of the accident?

The Commissioner: Where do you live now?

The Witness: 3822 South Asotin.

The Commissioner: All right, Mr. Lyon, you may proceed.

Direct Examination

By Mr. Lyon:

Q. You are living with your daughter and son-in-law at the present time? A. Yes.

Q. How old are you at this time?

(Testimony of Robert Markovich.)

A. Fifty-eight.

Q. How old were you at the time the injuries occurred? Were [4] you 58 then?

A. That would be in August. I will be 59 in August.

Q. What date? A. The 12th of August.

Q. What is your marital status? You are a widower? A. Yes.

Q. When was your wife deceased?

A. On the 26th of September.

Q. Of 1950? A. Yes.

Q. You have, in the past, been employed by Western Boat Building Company? A. Yes.

Q. Here in Tacoma, Washington?

A. Yes.

Q. How long have you been thus employed by them? A. Somewhere around 14 years.

Q. About 14 years?

A. Something like that.

Q. What is your usual occupation in connection with working for the Western Boat Building Co.?

A. Well, fastener—that is what I do most of the time. I do do the fastening.

Q. Will you describe, very briefly, the nature of those duties, Mr. Markovich? [5]

A. Well, whenever there is anything to be planked around the boat, I drill the holes for the bolts, and anything to be fastened—such things as that.

Q. Have you thus been rated or classified during the course of your employment with this com-

(Testimony of Robert Markovich.)

pany? Has that been your principal classification?

A. Yes.

Q. In the ordinary course of your duties as a fastener, would you have occasion to go out on boats that were in the stream, or in navigable waters?

A. Yes.

Q. And you have done that frequently?

A. Yes, we go anywhere we are ordered to go—when the boat is on the water. We do a lot of repair work on the boats that are tied up at the dock. If there is any work to be done, we have to go down there and do it.

Q. And in the ordinary course of your work, you work on ships on the water—for example, on the marine railway?

A. Yes. Or else on the other ways.

Q. On the ways? Being constructed?

A. Yes.

Q. Calling your attention particularly to the tug boat *El Sol*, where was this tugboat situated when you were working on it?

A. It was on the marine ways, that is, on the farther side. I don't know whether you would call it—that was on the [6] ways—marine ways No. 1.

Q. Where is that situated?

A. In the yard there.

Q. Well, I mean, just for the purpose of the record, whereabouts in Tacoma is that situated?

A. Here in Tacoma.

Q. The street number?

A. On East 11th street.

(Testimony of Robert Markovich.)

Q. And this marine railway you speak of—does this railway run down into the water?

A. Oh, yes.

Q. Do you know how far out it runs into the water?

A. Oh, I should judge about a hundred—hundred and fifty feet.

Q. And this tugboat *El Sol* had been placed on a cradle, and had it been taken up out of the water?

A. Yes.

Q. It was standing on the marine railway at the time you were working on it?

A. Yes.

Q. Do you know how far up on the end of the railway it had been drawn up? Do you have any idea how far up?

A. How far up?

Q. Yes, from the end of the railway—how far had it been drawn up. I am speaking of the end that runs down into the water, Mr. Markovich? [7]

A. I don't know. I can't answer that.

Q. You don't know, then?

A. It was quite a ways. It was pulled out so that we was able to work around the boat, so that—well, so it lay in a straight place so we could work all around the boat when the tide came in—the high tide.

Q. When the high tide came in, would part of the keel still be in the water?

A. Part would be.

Q. Do you know how long the boat had thus been up on the railway?

A. I don't think it had been there very long—few days, or about a week.

Q. Do you know whether or not any of the ship's crew were present on the boat? Working there at the same time that you were?

A. I am pretty sure that all of them was there. They was cooking and eating on the boat—sleeping there, too.

Q. The men attached to the boat were cooking meals, eating, and living on the boat?

A. Yes.

Q. How long had you been working on this boat?

A. Well, I didn't work on it very long. I think that was the first day I worked on it.

Q. What were you doing? [8]

A. Well, we was going to take some ration boxes out of the lifeboats. That is, they was leaking, and they was supposed to be taken out and taken to the shop for welding.

Q. At whose direction?

A. Mr. Petrich—Martin A. Petrich.

Q. He personally told you what to do?

A. Yes, to go there, yes.

Q. What part of this boat were you working on, immediately preceding your injury?

A. I don't remember. I remember Mr. Petrich told me to go up there to take those tanks out, but I don't remember what I was supposed to do before that.

Q. Were you engaged in getting out these tanks at the time?

(Testimony of Robert Markovich.)

A. Yes. I was to go up there to get them out. Mr. Petrich told me to go up there to get them out, and I went up there.

Q. You went up on top of the boat?

A. Yes.

Q. Were you walking around there at the time you fell?

A. The fellow was there working already, and he couldn't jar them loose.

Q. Who is this man you are referring to?

A. Well, he couldn't jar it loose, and I said, "By gosh, I know a way to get them out," and so I went around the boat—outside of the boat and got around where the tank was, and I put my weight on it and jerked a couple of times, and it came [9] loose, and on my way back, I turned around and started to walk back—there was a space there to walk on——

Q. About how wide?

A. Eight or ten inches. And I went on and I see a doggone board that was on there, partly covered up by the canvas, and I thought it was solid, and by golly, it was loose. And that is all I know.

Q. How far did you fall?

A. I should judge, about forty feet. I don't know exactly how far.

Q. What did you fall on to?

A. Well, I know I hit the scaffold, and a good thing I did or I wouldn't be alive today if I didn't. I know when I hit the scaffold, my ribs caved in—

(Testimony of Robert Markovich.)

I could feel them go down, but how I landed down when I hit, by gosh, I don't know how I landed.

Q. Did you land partially in the water?

A. Yes. It was tide—the tide was going out, but there was still water in there.

Q. While you were lying there, did anything happen to you? A. Yes.

Q. Did any water come off the ship on you?

A. Oh, yes. The crew—I guess they was having their afternoon coffee, and all of a sudden, I felt water come—splash—all over me—out of the sink. [10]

Q. Out of the ship's sink?

A. Out of the drain pipe.

Q. Ran all over you while you were lying there?

A. Yes.

Q. You were treated, were you not, by a Dr. Petersen, here in Tacoma? Would that be Dr. Wendell Petersen?

A. Yes. Well, he is in partnership with Dr. Allison—Allison and Petersen.

Q. Can you state, just generally, and in lay language, your understanding of the nature of the injuries you sustained?

A. Well, the doctor—in that report, it says that in the doctor's report.

Q. Yes, it is there, but I was just wondering if you understood the nature of your injuries?

The Commissioner: I think it might be well, perhaps, if we confined ourselves to the medical report, Mr. Lyon.

(Testimony of Robert Markovich.)

Mr. Lyon: I think that, generally, covers the incidents leading up to your injuries. I might ask you one more thing, however.

Q. (By Mr. Lyon): Have you ever made any application for compensation under the Washington Industrial Compensation Laws?

A. Well, I don't think so. The only one that came to the hospital was Mr. Livermore from the Longshoremen's Compensation Act.

Q. But, as far as you know, as to the Washington Industrial [11] Act, have you ever made any application under that?

A. Not as far as I know. But I wasn't getting any money from anybody and I was kind of short. I was in debt—my wife had passed away—and I called up the union and told them I wasn't getting any money for compensation and that I should get some compensation from somewhere, and he said, "doggone, it you should, regardless of who takes the case. You should have your monthly payments, anyway." So they make it out and find who is going to take it over, and I received three checks from them—from the State, and the last one, I had a notice of the discontinuance.

Q. Do you know who made the application?

A. I don't know.

Q. You don't? A. No.

Mr. Franklin: I will object to that, as leading.

Q. (By Mr. Lyon): Well, did you, personally, make any application?

A. I don't think I have to my knowledge, no.

Mr. Lyon: I think that is all.

(Testimony of Robert Markovich.)

The Commissioner: Have you done any work since the injury?

The Witness: No, sir. I will be lucky if I do any work for quite a while.

The Commissioner: Are you under the care of a doctor?

The Witness: Yes, sir. [12]

Mr. Lyon: You are still in a brace?

The Witness: Yes.

The Commissioner: You still wear a brace?

The Witness: And a complete cast, yes.

The Commissioner: All right, Mr. Franklin, you may inquire?

Cross-Examination

By Mr. Franklin:

Q. Didn't you file a claim with the Department of Labor and Industries on October 22, 1950?

A. Well, I don't think I have. I don't remember if I did.

Q. In any event, you received three payments of compensation? A. Yes, that is right.

Q. And you didn't return any of them?

A. No, sir.

Q. Did you pay your hospital bill? A. No.

Q. Did the State pay that?

A. That I don't know.

Q. They paid your doctor's bill?

A. That I don't know. I know I didn't pay it.

Q. Mr. Markovich, what time of day did the accident happen?

(Testimony of Robert Markovich.)

A. Well, it must have been about 3:00 o'clock, maybe a little bit later.

Q. Three o'clock in the afternoon?

A. Yes. [13]

Q. And at the time the tug *El Sol* was on a cradle, resting on the beach?

A. No, it wasn't resting on the beach—it was resting on the marine ways—on the blocks.

Q. First, under the ship was a cradle?

A. Yes.

Q. And the cradle ran on iron rails—a railroad track? A. Yes.

Q. And the ship had been pulled out of the water and was laying or resting on the land at the time you were working on it? A. Resting on the land?

Q. Yes.

A. No, it was resting on the marine ways.

Q. And the marine ways was on the land?

A. Well, if you call it that.

Q. I see. Now, could you indicate on any of these pictures, approximately where you fell?

A. There is no boat in there.

Q. There is no boat there, but these photographs——

Mr. Lyon: Just a minute. These do not represent the situation at the time of the accident, and I don't believe it would be proper evidence. I don't believe it would give the proper picture of the situation at the time the injury occurred, and it would be misleading and entirely irrelevant. [14]

The Commissioner: Since the picture does not

(Testimony of Robert Markovich.)

depict the position of the tug as it was at the time of the injury, I will sustain the objection. However, if you can give us some idea as to where you fell, with respect to the marine railway, then it may be of some help to us, but if you don't feel you can, from these pictures, you need not attempt to do so.

The Witness: If I did, I wouldn't say it right, so I won't do it. I could probably go down and show you.

Mr. Lyon: I think that might be more informative.

The Commissioner: That might more clear than attempting to fix the exact location from photographs.

Mr. Lyon: I think it would be prejudicial to this man——

Mr. Franklin: Well, he worked there for fourteen years, and it seems to me he should be able to show—to point out where he fell.

Q. (By Mr. Franklin): Do you recognize any of these pictures? Can you tell us what these pictures are—of what place?

A. Yes, I can see this sawmill on the side.

Q. Are these pictures of the marine railway down at the Western Boat Building Company?

A. Yes.

Mr. Franklin: That is all. Thank you.

The Commissioner: Just one last question. How long was the El Sol?

(Testimony of Robert Markovich.)

The Witness: That must be—I didn't measure it. [15]

Q. (By Mr. Franklin): Where were you standing at the time of this accident? A. Where?

Q. Were you standing amidships, or athwartship, or aft? A. About midship.

Q. About amidships. In other words, about half the distance of the ship, were you?

A. Just about.

Q. And when you fell, what did you land in?

A. I don't know. I don't know where I landed.

Q. Did you land on some rocks?

A. I hear somebody hollering——

Q. On what did you land?

A. I hear somebody hollering, "Pull him out of the water."

Q. Do you know what you landed in?

A. No.

Q. You don't know whether you landed on some rocks, on the boat, or what? A. I don't know.

Mr. Franklin: That is all, I think.

The Witness: There is some fellows that know about it better than I do. I probably lost my senses at the time, and I didn't know.

The Commissioner: Mr. Markovich, have you ever seen any vessel being placed on the marine railway? [16]

The Witness: Yes.

The Commissioner: Would you be kind enough to give me some idea as to its operation? How it is done, so that we will have a better picture?

(Testimony of Robert Markovich.)

The Witness: When they want to put a boat on the drydock, they have got their, they have got their cradle and they shove the boat in the water so that it is on the cradle—in line with the cradle on the marine ways.

The Commissioner: How is the boat put into this position? Is it brought up bow first?

The Witness: Yes.

The Commissioner: How is it placed on the marine ways?

The Witness: It has got to be shoved way down in the water so that the boat can get right—set on it right.

The Commissioner: What has to be shoved into the water? The railway?

The Witness: Then, when the boat sits right in the middle, they start the boat—they start pulling it up.

The Commissioner: Is there a line attached to the bow?

The Witness: No, not right away—until they find out how the boat is secured and it is lined up on the ways, and until the buttocks are propped up so that it will stay there the right way—then they pull it out on the railway as far as they can, so that the men can work on it. [17]

Redirect Examination

By Mr. Lyon:

Q. One additional question I would like to direct to you, Mr. Markovich. What rate of compensation

(Testimony of Robert Markovich.)

were you receiving at the time of this accident?

A. \$13.60.

Q. Does that sound right to you.

A. That is pretty close.

Q. That is on the repair work? A. Yes.

Q. How long have you been receiving that?

A. Well, I received that when we work on the railway—all the time.

Q. That is your regular wage? A. Yes.

Q. What do you receive when not working on the railway? A. We receive less.

Q. How much less?

A. It runs 12c an hour less, 96c a day less.

Q. You would receive 12c an hour less if you are working on new construction? A. Yes.

The Commissioner: Had you been working more or less steadily, prior to the date of your injury?

The Witness: Yes.

The Commissioner: Do you know how much you made for the [18] year immediately before you were hurt? Or do you know how much you would average per year?

The Witness: We get a yearly statement.

The Commissioner: What were your earnings from 1950——

The Witness: I was off quite a lot from work. I think it was \$2400 and some odd dollars.

The Commissioner: Do you have any information for the year prior to the injury, Mr. Franklin?

Mr. Franklin (to Mr. Stangland): Would you

(Testimony of Robert Markovich.)

furnish us with the figures for the year previous to the accident?

Mr. Stangland: Yes.

The Commissioner: From October, 1949, to October, 1950, if you will.

Mr. Stangland: Yes, sir.

The Commissioner: Mr. Franklin, will you stipulate that the claimant is presently disabled?

Mr. Franklin: Yes.

The Commissioner: And that it appears from his present condition his disability will extend into the future?

Mr. Franklin: Yes, sir.

The Commissioner: Anything further?

(No response.)

The Commissioner: You may step back, Mr Markovich.

(Witness excused.)

The Commissioner: Call your next witness. [19]

VERN W. STANGLAND

was called as a witness on behalf of the claimant, and having been first duly sworn, was examined and testified as follows:

The Commissioner: Please state your name?

The Witness: Vern W. Stangland, 2018 4th St. N. E., Puyallup, Wash.

(Testimony of Vern W. Stangland.)

Direct Examination

By Mr. Lyon:

Q. What is your connection, if any, with the Western Boat Building Company?

A. I am the bookkeeper.

Q. How long have you been employed thus?

A. Four and three-quarters years.

Q. Do you know, of your own knowledge, whether Western Boat Building Company carry any liability insurance under the terms, provisions and requirements of the Longshoremen's and Harbor Workers' Compensation Act?

A. Yes, they do.

Q. Do you know, of your own knowledge, how many employees are thus covered?

A. All the workers in the yard, including the office.

Q. All yard workers and office workers?

A. Yes.

Q. Have they thus been covered during the entire period of your employment by Western Boat Building Company? [19-A]

A. The office wasn't covered, except at the last. The policy started in January—January 1, 1951.

Q. What about the other workers in the yard?

A. The men in the yard here?

Q. At all times, since you have been in the employ?

A. Oh, including offshore work?

Q. This phrase, "including offshore work"—does the policy expressly state "offshore work," or

(Testimony of Vern W. Stangland.)

does it make any relation, or does it relate itself to the liability under the terms of the Federal Longshoremen's and Harbor Workers' Compensation Act?

A. I don't know the exact wording of it.

Q. You don't know the exact wording on the policy? A. No.

Q. So that your earlier answer as to any off-shore work may or may not be in accordance with the expressed terms of the policy?

A. That is correct.

Q. Do you have any idea, offhand, how much of Mr. Markovich's time during the year 1950; I am speaking only approximately—I understand you can't get it with any particular degree of accuracy—approximately how much of his time was spent in the type of work for which he received a daily rate of \$13.60? And how much was spent in the less hazardous activities, for which he received 12c per hour less compensation? [20]

A. I can't give you an exact answer.

Q. Could you give us an approximation?

A. Well, without looking at his record, no. Because we have so many different kinds of work. In other words, we will have a new boat on the ways down at Plant 2—we had one before the fire—and if he was working on that, it would be under one category. We have an awful lot of repair work during the year, and unless I saw the records, I couldn't give you an exact answer, and I would hate to estimate it, because I might make an awfully bad guess.

(Testimony of Vern W. Stangland.)

Q. Were you present at the time this injury occurred? A. I was in the office.

Q. Did you go out after the accident?

A. Out on the back porch overlooking the boat, although I couldn't see for the boat was in line with where he was laying. I didn't go down there.

Q. You didn't see him at the time the injury occurred? A. No.

Q. You had known about it? A. Yes.

Q. Can you tell us whether the water, at high tide, comes as far as to cover the keel of the boat El Sol, where it was placed on the marine railway at the time of the accident?

A. I would say, partially so.

Q. The bottom of the boat would be partially covered by [21] water. A. Yes.

Q. During the period of high tide?

A. Yes.

Q. Do you know about how long this boat had been on the marine railway?

A. Not exactly, but I would estimate two to four days.

Q. Do you know, yourself, whether the members of the ship's crew were present at the time of the accident? A. They were on board.

Q. The ship was in commission? A. Yes.

Q. How much longer did the ship remain for repair, if you know?

A. I think they were practically completed, and I believe the boat was at the dock the following day.

(Testimony of Vern W. Stangland.)

I may be wrong on that, but I have got the records down at the plant, on the docking of the vessel.

Q. But to the best of your recollection, it was returned to the water next day?

A. The next day, or the following day. I am not sure on that point. But we keep complete records on the docking of all boats.

Q. Was there any time, commencing with the time the boat was run up on the marine ways until the time it was returned to the water—in that interval, that there were not, ordinarily [22] and usually, members of the crew present and working on it?

A. Not to my knowledge.

Q. For the sake of the record, and because I am not too sure—I am not too clear on it, I am going to again inquire what his daily rate is?

A. Mr. Markovich's rate was 13.60.

Q. That is for an eight hour day?

A. Yes.

Q. Then there was a rate of compensation which was different from the compensation he received during repair work, and that was on work on new construction?

A. That is true.

Q. How much less was the rate on new construction?

A. 12c per hour less.

Q. To the best of your recollection, it would be 12c less per hour?

A. Right.

The Commissioner: Do you have any idea of the tonnage of the Tug El Sol?

The Witness: I have the records at the plant.

The Commissioner: Well, just approximately.

The Witness: I can give you the approximate length—it is 136 feet.

The Commissioner: Approximately 136 feet?

The Witness: Yes. [23]

The Commissioner: I just wanted to make sure it was over eighteen tons.

The Witness: I would say it was better than 200 tons.

The Commissioner: Do you have any questions, Mr. Franklin?

Cross-Examination

By Mr. Franklin:

Q. Mr. Stangland, can you identify those pictures and state what they are?

A. These are pictures of our marine ways No. 1 and No. 2.

Mr. Lyon: I don't know how important this is, but I don't think it is proper cross-examination. And at least for the record, I am going to make an objection.

Mr. Franklin: If you want, I will put Mr. Stangland on later.

Mr. Lyon: I think it would probably be allowable for you to ask questions of your own witness, whereas now, on cross-examination, they would not be proper.

The Commissioner: I think you had better hold that point in abeyance. Are you calling his witness as your own?

Mr. Franklin: When he rests.

The Commissioner: Are you resting?

Mr. Lyon: I have.

The Commissioner: Do either of you gentlemen have the medical report in his possession? That might give us——

Mr. Franklin: There is a certified copy of it in the [24] claim file.

The Commissioner: Are you going to make that available?

Mr. Franklin: Yes.

KARL KOCH

called as a witness on behalf of the claimant, and having been first duly sworn, was examined and testified as follows:

The Commissioner: Will you state your full name and address for the record?

The Witness: Karl Koch, K-a-r-l K-o-c-h.

Direct Examination

By Mr. Lyon:

Q. Mr. Koch, you are employed at the Western Boat Building Company? A. Yes.

Q. How long have you been thus employed?

A. About eight years.

Q. Has Mr. Markovich been working for the same company during all the time you were employed there? A. He did.

Q. What classification do you have, if you have any there as an employee? What do they call your type of work? A. They call us fasteners.

Q. You are a fastener, also? A. Yes.

Q. And were you working on the tug El Sol at

(Testimony of Karl Koch.)

the date [25] when Mr. Markovich sustained his injuries? A. Yes.

Q. Did you see Mr. Markovich fall at the time?

A. No. I didn't see him fall, but I heard a noise and I went over and he was laying down in the water.

Q. And for the Commissioner here, will you tell whereabouts he was lying? In how much water?

A. It was about a foot of water, because I had to go into the water and turn him around to get him on dry land. I just pulled him out of the water and picked him up, and he complained about his back, and I laid him on a piece of plywood and left him there until the ambulance got there.

Q. That is about all you know about the accident? A. I didn't see him fall.

Mr. Lyon: That is all. Thank you.

Mr. Franklin: No questions.

The Commissioner: You are excused.

(Witness excused.)

The Commissioner: Have you anything further?

Mr. Lyon: I think I would like to ask Mr. Koch one further question.

The Commissioner: All right. Mr. Koch, you may remain where you are.

Q. (By Mr. Lyon): Do you have to go out and work on boats out in the stream, as well as on the marine ways? [26] A. Yes.

Q. Do you do that frequently?

A. Well, when the boat is out there for repair, we have to go out to it.

(Testimony of Karl Koch.)

Q. Has Mr. Markovich ever done that, to your knowledge? A. Yes.

Q. On frequent occasions?

A. It all depends. If the work can be done on the water, they don't bring the boat in, but if it is something underneath the boat, they pull it out of the water. Such as when a boat is to be painted, or the hull repaired; then they bring it out of the water.

Q. Were repairs being made to this boat El Sol? A. Yes.

Q. Were you engaged in working on that?

A. Yes, such as taking the zinc plates off.

Mr. Lyon: I think that constitutes all the evidence I was going to introduce. I understood we were going to stipulate as to the other matters, such as the medical.

The Commissioner: That will be stipulated to. Mr. Franklin, I believe you wanted to put Mr. Stangland on as your own witness?

VERN W. STANGLAND

was called as a witness on behalf of the Employer & Carrier, and having been first duly sworn, was examined and testified as follows: [27]

Direct Examination

By Mr. Franklin:

Q. You have been employed there for how many years? A. Four and three-quarters years.

Q. You are entirely familiar with their plant?

(Testimony of Vern W. Stangland.)

A. Yes.

Q. I want to hand you this photograph marked Exhibit No. 1 and ask you to identify it.

A. Yes, this is the marine ways No. 1.

The Commissioner: Mark that Employers Exhibit No. 1.

(Document referred to, being a 8x9 photograph, was marked for identification as Employer's Exhibit No. 1.)

Q. (By Mr. Franklin): Is that the scene of Mr. Markovich's accident? A. Yes.

Q. What is the next picture you have?

A. That is a side view of this—it is the Western Lumber Manufacturing Company, which is right next to it, and I believe, north of the boat ways.

Mr. Franklin: Could we have that marked as Employer's 2?

The Commissioner: It will be so marked.

(Photo referred to was marked Employer's Exhibit 2, for identification.)

Q. (By Mr. Franklin): What is Employer's 3?

A. That is another view of the marine [28] ways.

(Photo referred to was marked for identification as Employer's Exhibit No. 3.)

Q. What does Employer's Exhibit No. 3 show—what mechanism, particularly?

A. Well, it shows the marine rails down at the

(Testimony of Vern W. Stangland.)

bottom, and this is the drawing device for drawing boats up the rails and out of the water.

Q. Where are those marine rails placed?

A. What do you mean?

Q. Over what area are they placed?

A. On the ground.

Q. Would you say, the beach or the land?

A. Yes, that is right.

Q. How are they affixed to the land?

A. I think they are weighted down. They have these planks, and two rails in the center and two on the outside.

Q. They project out into the water, do they?

A. Oh, yes.

Q. What is the method by which the boat is pulled onto the land by means of the railroad?

A. The boat is brought into the main entrance way of the ways, or a little way out, as far as needed, and they bring the boat in over the top of the ways, and set the blocks so that the boat will not tip. They have an electric motor and a winch on this side, and they slowly bring the boat up on [29] the dry dock.

Q. You are referring to the cradle, on which the boat rests?

A. They pull the whole marine way up—it runs on a regular track, and the boat is pulled directly into the plant.

Q. What would you say would be the area of the beach, or of the land covered by the marine rails?

A. You mean, the length?

(Testimony of Vern W. Stangland.)

Q. Yes.

A. Well, I would imagine 150 feet, anyway. We can pick up and bring up on the railway a 150 foot boat.

Q. And where is the winch or device to pull the cradle up on the rails?

A. Back over here—underneath the shed.

Q. Back of the railway? Back on the land?

A. Oh, probably 30 feet above the chain box.

Q. Where does the boat rest, with reference to the water? After it is pulled up on the rails.

A. Well, the bottom end of the dock is always in the water, and I don't think of any time, especially at low tide, where it would be clear out of the water.

Q. Is the upper part of the cradle out of the water?

A. When the boat is docked, yes, sir. They can run it clear out into the water so that it is submerged on the lower part. [30]

Q. When a boat is pulled up on the rails—on the shore, or on the land, is it replaced in the water again until all work on it is completed?

A. They can either finish the boat completely in the dock, or haul it up for cleaning and painting the bottoms, replacing the zinc plates, repairing or replacing propellers—any underwater work that has to be done. Then, you can put it back in the water for completion of the work inside of the boat.

The Commissioner: Are you offering those in evidence?

Mr. Franklin: Yes, I am.

(Testimony of Vern W. Strangland.)

Cross-Examination

By Mr. Lyon:

Q. I want to question him about them. Do you know when these photographs were taken?

A. I wasn't there that day. I can't recollect.

Q. Was it before or after the accident?

A. This was after the accident.

Q. How long after?

A. I would say, anywhere from one to two weeks afterward. But that is just a guess. I don't know exactly.

Q. Does this show the same conditions existing, or approximately the same conditions as existed at the time of the accident?

A. Except for the boat being on the dock. I don't believe there was any change of any kind to the dock, itself. [31]

Q. How long would you say that tugboat was?

A. About 136 feet.

Q. How much of that carriage shown in the picture—how long is that carriage?

A. I think, about 150 feet. I don't have the exact dimensions and I may be wrong, but I think that I may be a little over or a little under on that.

Mr. Lyon: That is all.

The Commissioner: The three photographs marked for identification as Employers Exhibits Nos. 1, 2 and 3, will be received in evidence.

(Documents referred to, previously marked for identification as Emp. Nos. 1, 2 and 3, were received in evidence.)

Mr. Franklin: The employer desires to offer at this time, this certified copy of the claim filed by Mr. Markovich with the Department of Labor & Industries, being Claim No. B-811942.

Mr. Lyon: May I examine it, please.

(Counsel examines file.)

Mr. Lyon: I have no objection.

Mr. Franklin: The employer rests.

The Commissioner: The certified copy of the record of the Department of Labor & Industries of the State of Washington, Claim File No. B-811942, will be received in evidence and marked [32] as Employer's Exhibit No. 4

(File referred to above was marked for identification as Employer's Exhibit 4 and received in evidence.)

The Commissioner: Both sides rest?

Mr. Lyon: We do.

Mr. Franklin: Employer rests.

The Commissioner: The hearing will be concluded, and decision reserved.

(Whereupon, at 11:40 o'clock, a.m., February 26, 1951, the hearing was concluded.) [33]

EMPLOYER'S EXHIBIT No. 4

State of Washington,
County of Thurston—ss.

I, R. J. McLean do hereby certify that I am the duly appointed, qualified and acting Supervisor of Claims in the Department of Labor and Industries, and that the attached claim file being Claim No. B-811942 is a full, true and complete copy of the original claim file (medical treatment bills accepted) of Robert Markovich who was injured on October 18, 1950, while in the employ of Western Boat Building Company which said claim file has been under my exclusive supervision, control and custody.

/s/ R. J. McLEAN.

Subscribed and sworn to before me this 15th day of Feb., A.D. 1951, at Olympia, Washington.

[Seal] /s/ JAMES E. LOCKHART,
Notary Public in and for the State of Washington,
Residing at Olympia, Washington.

State of Washington
Department of Labor and Industries
Division of Industrial Insurance

SUMMARY OF INFORMATION AND PROCEEDINGS

Firm name	Western Boat Building Co.	Copy
Office address	P.O. Box 1114, Tacoma 1, Wash.	
Location where accident occurred	2505 E. 11th St., Tacoma, Wash.	
Claimant's name	Robert Markovich.	
Address last given	38220 S. Asotin, Tacoma, Wash.	
Claim No.	B-811942.	
Occupation	fastener.	Age 57.
Character of injury	—fracture, severe, 1st lumbar vertebra, mult. abras. cont. shoulder L. ribs.	
Wage:	Daily \$13.60; Hourly sw.	Date of injury 10-18-50.

Employer's Exhibit No. 4—(Continued)

Claimant's marital status widower. Date pay ceased same.

Number of dependent children none.

Previous claims: 4 T. L. Eff. 10/22.

Proceedings: Allowed Date Nov. 14, 1950.

That at the time of injury as alleged the workman named was
.....engaged in work within the jurisdiction of the Division of
Industrial Insurance.

That.....claim has been filed by or on behalf of said work-
man within one year after the day upon which the injury occurred.

That.....physician's report (medical proof) has been filed
as required by law.

That at time of injury the employer was (not) in default.....

(1) Monthly Payment: Pay 1 month, Oct. 22 to Nov. 22, 1950
\$75.00.

(2) Partial Payment:days.....to....., inc., 19....., \$.....

(3) Lump Sum Settlement Closing Claim:

Released 12-14-50 JS Protest 11-20-50 CA

Time loss, temporary total disability....days to...., inc., 19.....

Permanent partial disability.....

Date notice sent to employer Nov. 15, 1950. Warrant B610095.

Adjusted on Report.

Computed Nov. 14, 1950.

/s/ R. J. MURPHY,
Claim Adjuster.

Accident Fund	Awards	Amount	Computed	Date Approved	War- rant No.
2—12/22/50	75.00	/s/ R. J. Murphy	12/20/50	B616962	
3— 1/22/51	75.00	/s/ R. E. Simmonds	1/24/51	B621993	

M. A. Fund Awards

Savon Drugs Inc. RX, Amt. \$2.16; Computed /s/ Olsen; Date Ap-
proved Notice Sent Jan. 1, 1951.

Braleys Inc. RX, Amt. \$6.13; Computed /s/ Olsen; Date Ap-
proved Notice Sent Feb. 14, 1951.

LOYE

Name of
injured workman.....

Robert Markovich

Will this workman be kept on salary during his period of disability?

no

Construction ☐

Operation ☐

Has he any financial
interest in the business?

no

Repair ☐

On launched boat ☐
Sole owner?

Partner? Stockholder?

MEDICAL AID AWARDS

Amount Computed

Date Nettes
Sent

Warrant No.

Claim No. B811942

Firm No. 17093

Class 9-2

STATE OF WASHINGTON

REPORT OF ACCIDENT

Department of Labor and Industries

Name of injured workman..... Markovich, Mr. Robert

Address (to which all mail to be addressed)..... 3822 So. Asotin

Date of birth..... Yugoslavias Sex M Age 57

Height 5' 11 1/2 Weight 145

Date accident occurred Oct - 18 - 1950

State hour of accident 3 P.M.

Give last date worked Oct - 18 - 1950

If you have returned to work give date

Name of employer Western Boat Building Co.

Address E. 11th St.

Were you doing your regular work at time of accident? Yes

On employer's premises? Yes

Describe the accident in full: After taking station boxes from boat with difficulty, walking back held on to board which gave away, fell and couldn't remember for a short time

State nature and date of any previous injuries received by you. --

Have you filed claim with any other State Agency for this disability? no Monthly benefits received? nothing

How long have you worked for this employer? 15 years

Wage per day \$13.60

Did you report this accident to your immediate supervisor? yes

If so, give date. Oct - 18 - 1950

If married, full name of wife or husband widower

Address, wife or husband (Write "Same" if living together)

If divorced, date

(Write "Same" if living together)

GIVE NAMES AND BIRTH DATES OF YOUR CHILDREN UNDER 18 SUPPORTED BY YOU

NAME	Relationship	Date of Birth Mo Day Year	NAME	Relationship	Date of Birth Mo Day Year
Robert Markovich	Robert Markovich	1939	Robert Markovich	Robert Markovich	1939

I declare that the foregoing statements are true to the best of my knowledge and belief.

Signed 22 day of Oct 1950, at Tacoma Washington.

IMPORTANT WORKMAN SIGN HERE /s/ Robert Markovich

Employer Must Complete This Report by Filing in and Signing Employer's Section Below. Then Mail Report at Once to Department of Labor and Industries, District Office. (See reverse side for address.)

Firm number of employer 17093

(Number assigned by Department of Labor and Industries)

Firm name of employer Western Boat Building Co.

Address P. O. 1114 Tacoma, Wash

Have the hours worked and wages paid this workman been included in the quarterly payrolls reported to this department? yes

In what class has this workman been included in the quarterly payrolls reported to this department? 9-2

If not included, give reason

How long has workman been employed by you? 15 yrs

Occupation when injured? Fastener

Business of employer Boatbuilding Location of plant or place of work where accident occurred 2505 E. 11th St., Tacoma

Check in which department workman was employed? Construction ☐ Repair ☐ On launched boat ☐

Name of injured workman Robert Markovich

Has he any financial interest in the business? no

Will this workman be kept on salary during this period of disability? no

Date and hour of accident 3:00 P.M. Last day worked Oct. 18-1950

Was workman engaged in the regular course of his employment when injured? yes

Did accident occur on your premises? yes

Date and hour accident reported to you 3:00 P.M. To whom reported M.A. Patrich, Jr., station. Partner

Do you oppose allowance of claim? Why? (Attach letter if necessary) No

How did accident happen? He walked to outside of lifeboat and so doing-grabbed hold of

lifeboat cover brace, which being removable, pulled out, causing him to lose balance and

fall --

(Describe the accident fully, stating whether the injured person fell or was struck, etc., and all the factors contributing to the accident. If necessary write a supplemental letter.)

I declare that the foregoing statements are true to the best of my knowledge and belief. Western Boat Building Co.

Signed this 27th day of Oct. 1950 Martin A. Patrich, Jr. By Partner

(Official position)

Employer's name Robert Markovich

Workman's name Western Boat Bldg.

Date of accident 10/18/50

Diagnosis and description of injury in full Compression fracture, severe, 1st lumbar vertebra.

Multiple abrasions and contusions, shoulders, left ribs.

Do you believe present condition or disability is result of above injury? yes

Give treatment used Hospital & cast.

Has he been treated for this condition previous to this accident? no

Is there any evidence of pre-existing constitutional disease present which may retard recovery? no

Name and address of hospital to which patient was taken Tacoma General Hospital

Will injury cause loss of time 1 year

Describe any previous injury received by patient --

This report can be accepted only when signed by a licensed physician.

I declare that the foregoing statements are true to the best of my knowledge and belief.

Signed /s/ Wendell G. Peterson, MD

Address 1422 Montway Bldg.

Tacoma 2, Washington

Date October 22, 1950

(See reverse side for instructions)

X-RAY FINDINGS X-RAYS Positive For fracture

Memo by Claim Agent: Allowed By R.M. Adj.

Employer's Exhibit No. 4—(Continued)

(Copy)

November 15, 1950

Mr. Robert Markovisch,
3822 South Asotin,
Tacoma, Washington.

Re: B-811942

Dear Mr. Markovisch:

In regards to a phone call this morning from your daughter pertaining to your recent injury. The claim has been allowed by this Department and one month's time loss will be mailed to you November 22, 1950.

Very truly yours,

SUPERVISOR OF INDUS-
TRIAL INSURANCE,

By H. WILLIAMS,
Adjudicating Claims
Examiner.

HW/jac

Employer's Exhibit No. 4—(Continued)

State of Washington, Department of Labor and
Industries Claim Adjuster's Report

Copy

Claim No. B 811942

Date November 22, 1950

To

Attention

Herewith file, claim of: Robert Markovich.

Address: 3822 S. Asotin, Tacoma, Washington.

Assignment: Refer to R. J. McLean, Supvr. of
Claims assignment dated 11-22-50.

X-rays 0

By

(This assignment to be completed within ten days.)

DEPARTMENT OF LABOR
AND INDUSTRIES

Tacoma Branch Office

November 28, 1950

(Complete file attached)

Attention: R. J. McLean,
Supervisor of Claims.

Re: Claim No. B 811942, Robert Markovich,
3822 S. Asotin, Tacoma, Washington.

After investigating the accident to Robert Markovich at the Western Boat Building Company on October 18, 1950, I find it happened as reported on claim slip, and the boat *El Sol* was still in commission with the crew working days.

The boat was on the marine ways at the Company

Employer's Exhibit No. 4—(Continued)

plant at E. 11th Str., Tacoma. In my opinion, this is a case for the Harbor Worker's Compensation as we have no jurisdiction over boats in commission.

/s/ J. E. DOYLE,
Inspector.

JED:ca
attach

Received December 1, 1950.

U. S. Department of Labor
Bureau of Employees' Compensation
Longshoremen's and Harbor Workers'
Compensation Act
Fourteenth Compensation District
Room 604, 905 Second Avenue Building
Seattle 4, Washington

Copy November 17, 1950

Address Replies to:

The Deputy Commissioner

Refer to File No.

F. J. Graham, Vice President,

United Pacific Insurance Co.

Medical Arts Bldg.,

Tacoma 1, Wash.

Re: Robert Markovich, 217-21, Western Boat
Building Co.

Injured: October 18, 1950. Your File
WC 22-11610.

Dear Mr. Graham:

I have your letter of November 16, 1950, relative

Employer's Exhibit No. 4—(Continued)

to the case of Robert Markovich, who is reported to have sustained an injury on October 18, 1950, while engaged in work incidental to the repair of the vessel "El Sol" which apparently was on a marine railway at the yard of the Western Boat Building Company, Tacoma, Washington.

In your letter you state that in view of the holding of the Washington Supreme Court in the case of Rohlfs vs. Department of Labor and Industries, 190 Wash, 566 (69 Pac. 2d 817), you believe that the Department of Labor and Industries has jurisdiction of this claim and understand, the Department will assume responsibility for medical bills as well as compensation.

In this connection I should like to point out to you that the Bureau has consistently taken the position that in view of the purposes for which a marine railway is constructed and used, it is clear that a marine railway is a "dry dock" within the meaning of that term as used in the Longshoremen's and Harbor Workers' Compensation Act, and that injuries sustained in connection with the repair of a completed vessel engaged in commerce and navigation, while said vessel is on a marine railway, are covered by the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

I am therefore unable to agree with your belief

Employer's Exhibit No. 4—(Continued)

that the Department of Labor and Industries has jurisdiction in this matter.

Very truly yours,

/s/ J. J. O'LEARY,

Deputy Commissioner.

cc: Dept. of Labor & Industries.

Received November 20, 1950.

November 22, 1950

(Copy)

Peter Pete,
Tacoma Office,
421 Perkins Bldg.,
Tacoma, Wash.

Re: Claim No. B-811942, Robert Markovich.

Dear Mr. Pete:

We are attaching the record in the above case and direct your attention to the letter of November 17th, by Mr. O'Leary, Deputy Commissioner of the Longshoremen's and Harbor Workers' Compensation Act.

Will you please investigate this case and supply us with all of the facts. Was the vessel on which this man was working in commission as an instrument of navigation and commerce and where was it located while the work was being done? Did the

Employer's Exhibit No. 4—(Continued)

accident occur aboard ship or was this man on the dock at the time he was hurt?

Very truly yours,

SUPERVISOR OF
INDUSTRIAL INSURANCE,

.....,

R. J. McLean,

Supervisor of Claims.

RJMcL:bp

(Copy)

December 1, 1950

Peter Pete,

Tacoma Office,

421 Perkins Building,

Tacoma, Wash.

Re: Claim No. B-811942, Robert Markovich.

Dear Mr. Pete:

On November 22nd, we sent you the above numbered record and asked that an investigation be made. Will you please expedite the investigation as much as possible, as we are being pressed for a decision in the matter.

Very truly yours,

SUPERVISOR OF
INDUSTRIAL INSURANCE,

.....,

R. J. McLean,

Supervisor of Claims.

RJMcL:bp

cc to Mr. E. S. Franklin, c/o Bogle, Bogle & Gates,
6th Floor, Central Bldg., Seattle 4, Wash.

Employer's Exhibit No. 4—(Continued)

Department of Labor and Industries
Interoffice Communication

(Copy)

Date: December 4, 1950

To: R. J. McLean, Supvr. of Claims.

From: Peter Pete, District Supervisor.

Office: Tacoma.

Subject: Re: Claim No. B 811942, Robert Markovich, 3822 So. Asotin, Tacoma, Washington.

Referring to your letter of December 1, 1950, re the above named claimant, please be advised that this claim together with investigation made by Safety Inspector John Doyle was sent to Olympia on November 30, 1950, and no doubt is now in your hands.

/s/ PETER PETE,

District Supervisor.

PP:ca

noted

HW

[Stamped]: December 6, 1950.

Received December 5, 1950.

Employer's Exhibit No. 4—(Continued)

Law Offices of
BOGLE, BOGLE & GATES
6th Floor Central Building
Seattle 4
Cable Address "Bogle Seattle"

November 28, 1950

(Copy)

Mr. R. J. McLean, Claim Agent,
Department of Labor & Industries,
Olympia, Washington.

Re: Claim No. B-811942, Robert Markovich.

Dear Sir: .

This will explain the writer's visit to Olympia yesterday in connection with the above case.

We represent United Pacific Insurance Company, carrier for Western Boat Building Company, under the Longshoremen & Harbor Workers' Act.

We understand that Mr. Markovich filed a claim for his injury of October 18th which occurred on land, while he was on a marine railway and that the Department allowed the claim and was preparing to issue a warrant to him for compensation. We have also been advised that Mr. J. J. O'Leary, Deputy Commissioner for the Longshoremen & Harbor Workers' Act, has written you that he regards this work as under the jurisdiction of his act.

We think that Mr. O'Leary is plainly mistaken in the matter. We think the case of *Rholfs v. Dept.*

Employer's Exhibit No. 4—(Continued)

of Labor & Industries, 190 Wash. 566, effectually disposes of his contention. This decision of our State Supreme Court is binding upon the Department and we assume that you plan to follow it.

The writer recalls that at the time of the Rholf's case, Mr. O'Leary's predecessor, Mr. Marshall, was making the same contention.

We are quite at a loss to understand the position of the officials of the Longshoremen & Harbor Workers' Act in interjecting themselves into this matter, especially upon plainly erroneous legal grounds. The following cases hold that a marine railway is not subject to the Longshoremen & Harbor Workers' Act but to the State Compensation Act:

Colonna Shipyard v. Lowe,

22 F. (2d) 853.

Norton v. Vesta Coal Co.,

63 F. (2d) 165.

The Vesta Coal Co. case was appealed to the United States Supreme Court by the attorney for the Longshoremen & Harbor Workers' Act, but the appeal was withdrawn in an order entered in the case, found in 291 U.S. 641, reading as follows:

"January 15, 1934. Per Curiam: As it appears that the government has not adopted the conclusion that the decision below is correct and no substantial controversy is presented at the bar

Employer's Exhibit No. 4—(Continued)

of this Court, the writ of Certiorari herein is dismissed.”

Consequently, we are at a loss to understand the position of Mr. O’Leary in the matter.

We further desire to advise you that since the Rholfs case all of the shipyards have paid premiums to the Department for work done on marine railways, and if this claim is not to be allowed, claims for refunds in substantial amounts would probably be made.

There is another reason why this claim must be allowed by the Department. This is because of the holding in *Davis v. Department of Labor & Industries* by the United States Supreme Court, holding that in any twilight zone of jurisdiction the State of Washington can constitutionally apply its Workmen’s Compensation Act.

We understand the file is now in Tacoma. We would appreciate very much if upon determining that the injury occurred on a marine railway on land you will order the prompt payment of this claim.

Thanking you for your cooperation, we are,

Very truly yours,

BOGLE, BOGLE & GATES,

By /s/ EDW. S. FRANKLIN,

Received November 29, 1950.

Employer's Exhibit No. 4—(Continued)

Department of Labor and Industries
Interoffice Communciation

(Copy)

Date: December 8, 1950

Ralph Brink*

To: John Shaughnessy, Supervisor Industrial Insurance.

From: Harry L. Parr, Assistant Attorney General.

Office: Olympia.

Subject: Robert Markovich—Claim No. B 811942.

The question is—whether or not a workman working on a ship, the ship being on a marine railroad, the marine railroad being a railroad that goes into the navigable stream but comes out on land, would come under the act.

Presumably, Mr. Markovich was working on the boat or ship, when it was upon the land end of the marine railroad. A pursual of the file, however, does not definitely fix the place of his work on the land portion of the marine railroad. This brief, however, is on the assumption that the place where he worked, on the marine railroad, was entirely on the land.

Comar v. Dept. 187 Wash. 99, the Supreme Court held "the locus of the injury was properly held decisive on the question to be determined and the

[*On original the name Ralph Brink appears over the name John Shaughnessy in longhand.]

Employer's Exhibit No. 4—(Continued)

case cited does not support appellant's contention in the Rohlfs' case."

Rohlfs v. Dept. 190 Wash. 586. In this case the boat had been completely lifted from the water and was standing upon a track at some distance from the shore (page 568).

[Between paragraphs in longhand]: Citator shows no change.

A marine railroad is not like a floating dock or a dry dock. A marine railroad is on the land, and being on the land is under state compensation act. If the injured workman was working on land and not on water the labor was "a matter of purely local concern, unconnected with navigation," and was essentially non-maritime in nature.

Maryland Casualty Company v. Lawson (1943) 100 Fed. (2nd) 733, holds to the contrary. The Longshoremen and Harbor Workers Compensation Act is found in Title 33, Section 901 and Section 902 recites the coverage with this exception, "and if recovery * * * may not validity be provided by state law."

[Longhand in foot margin]: Pay and follow.

M. L. 12/14/50.

[Longhand in foot margin]: Release warrant.

J. S. 12/14/50.

Employer's Exhibit No. 4—(Continued)

Mr. John Shaughnessy -2-

Dec. 8, 1950

Re: Robert Markovich,
Claim No. B 811942

Supporting the state position that the state law governs when the accident is on land are the following Federal cases:

1. Swanson vs. Marra Bros., 328 U. S. 1, 7.
2. Davis vs. Department Labor and Industries (1942), a late case where our Supreme Court held "benefits under state compensation acts may be claimed for accidents occurring on navigable waters of the U. S. when they happen in the course of a purely local operation unconnected with commerce and navigation."

That case was carried throughout different U. S. courts and finally to the Supreme Court of the U. S. which denied rehearing and reported in 317 U. S. 713. The action of the U. S. Supreme Court means that they were in accord with what the state court said and for that reason denied rehearing. The case of Davis vs. Department of Labor and Industries is found in 12 Wash (2nd) 349.

3. Royal Indemnity Company vs. Puerto Rico Cement Corp. (1944).

This cause was tried in the circuit court of appeals which said:

The clause in the Longshoremen and Harbor Workers' Compensation Act, "may not validly be provided by state law," limits the maritime field

Employer's Exhibit No. 4—(Continued)

of this chapter. The U. S. Supreme Court denied rehearing of the case in 223 U. S. 756.

It would seem that if Robert Markovich was working on a boat on land that he would be under the State Act.

/s/ HARRY L. PARR.

HLP:pm

2 pages

State of Washington
Department of Labor and Industries
Olympia

Please Comply With the Following Where
Checked and Return the Bill to This Office.

1. Affix personal signature.
2. Submit bill on enclosed form.
3. Attach hospital operative record—laboratory reports.
4. Submit x-rays to confirm diagnosis and/or to complete the file.
5. List x-ray findings on bill.
6. Bill should be signed by attending physician as shown by the records.
7. Please specify exact treatment given on dates listed.
8. Attach copies of the prescription charged for. (Copy also required for all refills.)

Employer's Exhibit No. 4—(Continued)

9. Itemize your services.

10.

Very truly yours,

DEPARTMENT OF LABOR AND
INDUSTRIES MEDICAL DIVISION,

/s/ W. OLSON.

[Longhand]: Braley, Inc., 738 St. Helens Ave.,
Tacoma, Wn.

[One-Cent U. S. Postal Card.]

Reply Card. This Side of Card Is for Address.

Addressee: Department of Labor and Industries,
Olympia, Washington.

[Stamped]: Received Dec. 18, 1950, Olympia,
Wash.

Certificate of Disability
Doctor's Statement

Claim No.: B-811942.

Name of claimant: Robert Markovich.

Present address: 38220 Asotin St., Tac.

Name of employer: Western Boat Bldg. Co.

Date of injury: 10/18/50.

Date quit work due to injury: 10/18/50.

Did you examine claimant today? no.

Is claimant able to resume work? no.

If so, what date?.....

Did you instruct claimant to return to work? no.

Employer's Exhibit No. 4—(Continued)

Is treatment concluded? no.

If still disabled state approximately when able to work?

Will he have any permanent disability? possibly.

Remarks:

.....

.....

.....

Date: 12/13/50.

/s/ W. S. PETERSON, M.D.
(Attending Physician.)

Workman's Statement

Have you returned to work?.....

If so, on what date did you do so?.....

If you did not return to work for your same employer, state name and address of other employer?

.....

Date: 12/13/50.

/s/ ROBERT MARKOVICH.
(Claimant.)

Received December 18, 1950.

Employer's Exhibit No. 4—(Continued)

[One-Cent U. S. Postal Card.]

Reply Card. This Side of Card Is for Address.

Addressee: Department of Labor and Industries,
Olympia, Washington.

[Stamped]: Received Jan. 22, 1951, Olympia.

Certificate of Disability

Doctor's Statement

Claim No. B-811943.

Name of claimant: Robert Markovich.

Present address:

Name of employer:

Date of injury: 10/18/50.

Date quit work due to injury:

Did you examine claimant today? Yes.

Is claimant able to resume work? no.

If so, what date?

Did you instruct claimant to return to work? no.

Is treatment concluded? no.

If still disabled state approximately when able to
work? undet.

Will he have any permanent disability? probably.

Remarks:

.....

.....

.....

Date: 19 Jan., '51.

/s/ W. G. PETERSON.

(Attending Physician.)

Employer's Exhibit No. 4—(Continued)

Workman's Statement

Have you returned to work?.....
 Have you applied for unemployment benefits? No.
 If you did not return to work for your same employer,
 state name and address of other employer?

Date: 19-1.

/s/ ROBERT MARKOVICH.

(Claimant.)

Received January 22, 1951.

U. S. Department of Labor
 Bureau of Employees' Compensation

CERTIFICATE

This is to certify that the attached proceedings before the Deputy Commissioner of the Fourteenth Compensation District of the U. S. Department of Labor, Bureau of Employees' Compensation, in the matter of:

Name of Proceeding: Robert Markovich.

Case No.: 217-21.

Place: Tacoma, Wash.

Date: Feb. 26, 1951.

were held as therein appears, and that this is the original transcript thereof for the files of the U. S. Department of Labor.

ACE REPORTING CO.

By /s/ GLENN WALSTON.

Official Reporter.

[Endorsed]: Filed July 5, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure as amended, and Subdivision 1 of Rule 11 as amended, of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith all of the original papers and pleadings in the above-entitled cause, pursuant to Plaintiffs' Designation of Record on Appeal herein, and the said papers and pleadings herewith transmitted constitute the Record on Appeal from that certain Order of the above-entitled Court, filed and entered on July 17, 1951, to the United States Court of Appeals for the Ninth Circuit, at San Francisco, California, and are identified as follows:

1. Petition for Injunction.
2. Motion for Interlocutory Injunction.
3. Order Fixing Time for Hearing Interlocutory Injunction.
4. Marshal's Return on Summons (on Robt. Markovich, U. S. Atty. and Atty. Gen.).
5. Marshal's Return on Order.
6. Motion, Robert Markovich, to Intervene as Defendant.

7. Order Allowing Robert Markovich to Intervene.

8. Stipulation and Order Continuing Preliminary Injunction.

9. Marshal's Return on Summons & Petition for Injunction.

10. Marshal's Return on Order.

11. Stipulation and Order Striking Trial Date.

12. Answer, O'Leary, to Petition.

13. Brief on behalf O'Leary.

14. Affidavit of Mailing.

15. Answer, Markovich, to Petition for Injunction.

16. Brief on behalf Markovich.

17. Plaintiffs' Trial Memo.

18. Transcript of Proceedings before Commissioner.

19. Defendant's Memo in Opposition to Plaintiffs' Motion for Trial de novo.

20. Order (after trial) (filed and entered July 17, 1951).

21. Stipulation re compensation, etc., pending appeal.

22. Plaintiffs' Notice of Appeal.

23. Cost Bond on Appeal.

24. Designation of Record on Appeal.

I do further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto for the preparation of the Record on Appeal in this cause, to wit:

Notice of Appeal (Plaintiffs') \$5.00

and that said fee has been paid to the Clerk by Plaintiffs.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Tacoma, Washington, this 10th day of September, 1951.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 13091. United States Court of Appeals for the Ninth Circuit. Western Boat Building Company, a Partnership, and United Pacific Insurance Company, a Corporation, Appellants, vs. J. J. O'Leary, Deputy Commissioner, 14th Compensation District, Under the Longshoremen's & Harbor Workers' Compensation Act, and Robert Markovich, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed September 12, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13091

WESTERN BOAT BUILDING COMPANY, a
Partnership, and UNITED PACIFIC INSUR-
ANCE COMPANY, a Corporation,

Appellants,

vs.

J. J. O'LEARY, Deputy Commissioner, 14th Com-
pensation District, Under the Longshoremen's
& Harbor Workers' Compensation Act, and
ROBERT MARKOVICH,

Appellees.

STATEMENT OF POINTS

Comes Now appellants, Western Boat Building Company, a partnership, and United Pacific Insurance Company, a corporation, and propose on its appeal to the Circuit Court of Appeals for the Ninth Circuit to rely on the following points as error:

1. The lower court erred in not according a de novo hearing to appellants on the question of whether the appellee, Markovich, was injured on navigable waters of the United States.

2. The court erred in holding appellee Markovich was injured on navigable waters and subject to the Longshoremen's and Harbor Workers Act.

3. The Court erred in holding appellee Markovich was not under the exclusive provisions of the

Workmen's Compensation Act of the State of Washington.

BOGLE, BOGLE & GATES,
Attorneys for Appellants, Western Boat Building
Company, a Partnership, and United Pacific
Insurance Company, a Corporation.

[Endorsed]: Filed September 26, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD
TO BE PRINTED

To the Clerk of the United States Court of Appeals
for the Ninth Circuit:

1. Petition for Injunction.
2. Motion for Interlocutory Order.
3. Motion to Intervene as Defendant.
4. Order Allowing Intervention.
5. Defendant O'Leary's Answer.
6. Intervenor Markovich's Answer.
7. Order of Dismissal Entered July 17, 1951.
8. Appellant's Exhibit, Claim File of State Department of Labor and Industries, excluding last page thereof.
9. Notice of Appeal.
10. Designation of Record.

11. Cost Bond on Appeal.
12. Certificate of Clerk to Record on Appeal.

Dated this 20th day of September, 1951.

BOGLE, BOGLE & GATES,
Attorneys for Appellants, Western Boat Building
Company, a Partnership, and United Pacific
Insurance Company, a Corporation.

[Endorsed]: Filed September 26, 1951.